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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA  
THIRD APPELLATE DISTRICT  
(San Joaquin)

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RONALD MILLER,

Plaintiff and Appellant,

v.

CHARLES F. BUSH, SR., et al.,

Defendants and Respondents.

C061459

(Super.Ct.No.  
CV022559)

Plaintiff Ronald Miller appeals from an order awarding attorney fees and costs in the amount of \$8,437.89 to defendants Charles F. Bush, Sr., and Kathleen Bush. For reasons that follow, we shall reverse the order.

BACKGROUND

Miller filed the underlying action following a dispute over real property owned by the Bushes. In November 2004, the parties agreed to a settlement of the action, with the Bushes agreeing to pay Miller a sum certain upon Bush's sale of the property. The parties recited the terms of their agreement on the record before the trial court, and it was later memorialized in a written "Notice of Lien and First Right of Refusal," which was signed by the parties and recorded in January 2007.

As pertinent to this appeal, the recorded Notice of Lien and First Right of Refusal contains the following attorney fees provision: "Should any legal action or proceeding arising out of or related to this Notice of Lien and Right of Refusal be brought by either BUSH or MILLER, the prevailing party shall be entitled to receive from the other party, in addition to any other relief which may be granted, the reasonable attorneys' fees, costs and expenses incurred in the action or proceeding by the prevailing party."

In or about July 2007, Miller filed a motion for judgment by stipulation pursuant to Code of Civil Procedure section 664.6, seeking an order compelling the Bushes to sell the property to him for \$1.2 million. The Bushes opposed the motion, claiming that the settlement agreement did not oblige them to sell the property to Miller at so low a price.<sup>1</sup>

In ruling on his motion for judgment, the trial court disagreed with Miller's interpretation of the parties' settlement agreement and, on its own motion, ordered Miller to show cause why the action should not be dismissed with prejudice.

When neither party filed opposition, the trial court ordered the dismissal of Miller's motion with prejudice.

Miller's appeal from that order (the first appeal) was dismissed by this court on September 18, 2008, as premature because the trial court's order was unsigned and thus did not qualify as an appealable

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<sup>1</sup> While his motion for judgment was pending, Miller quitclaimed to the Bushes "any interest [he] may have acquired in the subject property" by virtue of the "Notice of Lien and First Right of Refusal," and the property was sold by the Bushes to a third party.

judgment. (Code Civ. Proc., § 581d; *Miller v. Bush* (Sept. 18, 2008, C059356) [nonpub. order].)

Miller then applied in the trial court for a signed order dismissing the case. After the court signed and filed the order on September 18, 2008, Miller filed a notice of appeal on October 9, 2008 (the second appeal) from that order of dismissal. (*Miller v. Bush, supra*, C060166.)

On the same day Miller filed his notice in the second appeal, the Bushes filed a motion in the trial court to "determine prevailing party" and to "set . . . attorney's fees and costs" after dismissal of the first appeal. The fee request was based on the clause in the Notice of Lien and First Right of Refusal. The motion states that they "have and will incur" attorney fees of \$8,337.50 "in obtaining a dismissal of [Miller's] appeal."<sup>2</sup>

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<sup>2</sup> In support of the motion, the Bushes' counsel submitted a declaration, in which he averred that Miller "filed an appeal based on his contention that [the] court misconstrued the meaning of the stipulated settlement set forth in the recorded Notice of Lien and First Right of Refusal . . . . [¶] The following attorney's fees have been incurred in the defense of this action:

"Bart Barringer @ \$350.00/hr.	10.0 hours	....\$3,500.00
"Paralegal fees \$125.00/hr.	28.5 hours	.....\$3,562.50
"Secretary fees \$ 35.00/hr.	2.5 hours	.....\$ 87.50
"Future attorney fees	2.5 hours	.....\$ 875.00
"Future paralegal fees	2.5 hours	.....\$ 312.50
"TOTAL ATTORNEY FEES		\$8,337.50.

"I expect to incur additional attorney's fees in responding to [Miller]'s opposition to this motion, traveling to and from the hearing on this motion, and preparing an Order After Hearing. I estimate said fees will include an additional 2.5 hours at a rate of \$350/hour and 2.50 hours at a rate of \$125/hour." (Some paragraph breaks omitted.)

The trial court granted the Bushes' motion for attorney fees in connection with the dismissed appeal and entered an order awarding them the attorney fees they sought, plus costs of \$100.39. Miller appeals.

#### DISCUSSION

Miller contends a dismissal pursuant to Civil Code section 581d "does not establish a prevailing party" for the purposes of awarding attorney fees (Civ. Code, § 1717). He also argues the award is not supported by evidence that the Bushes actually incurred the attorney fees sought. The first contention has merit.

We review de novo, as a question of law, "'a determination of the legal basis for an award of attorney fees'" (*Butler-Rupp v. Lourdeaux* (2007) 154 Cal.App.4th 918, 923).

In an action for breach of contract, Civil Code section 1717 permits an award of attorney fees and costs to the prevailing party, i.e., "the party who recovered a greater relief in the action on the contract. The court may also determine that there is no party prevailing on the contract for purposes of this section." (Civ. Code, § 1717, subd. (b).) The prevailing party determination can be made "only upon final resolution of the contract claims and only by 'a comparison of the extent to which each party ha[s] succeeded and failed to succeed in its contentions.'" (*Hsu v. Abbata* (1995) 9 Cal.4th 863, 876.)

Miller asserts that, because there was no final disposition of the case when the first appeal was dismissed, the trial court erred in determining that the Bushes were prevailing parties under Civil Code section 1717. This is so, he argues, because "an appeal based

on Code of Civil Procedure [s]ection 581d does not address the merits of an appeal"; rather, it "creates the prospect of a new appeal." Indeed, the second appeal was already underway when the Bushes sought attorney fees as prevailing parties in the first appeal.

Miller is correct. The court's prevailing party determination and award of attorney fees were premature and therefore error.

Prevailing on an appeal is not the same as being the party who prevails "on the contract" for purposes of assessing entitlement to attorney fees under Civil Code section 1717. A party who prevails on appeal is not entitled to an award of contractual attorney fees where the appellate decision does not finally decide the merits of the lawsuit, but instead contemplates further proceedings in the trial court. (*Presley of Southern California v. Whelan* (1983) 146 Cal.App.3d 959, 961 (hereafter *Presley*); see also *Wood v. Santa Monica Escrow Co.* (2009) 176 Cal.App.4th 802, 807; *Estate of Drummond* (2007) 149 Cal.App.4th 46, 52-53.)

In *Presley*, the party claiming attorney fees had won an appeal reversing the trial court's granting of a summary judgment motion. Since the appellate decision did not finally decide the lawsuit, but merely reversed for further proceedings, *Presley* held there was no prevailing party because the ultimate winner of the case had not been determined; "[t]here must be a prevailing party before the fee provision applies, and no one has yet prevailed here." (*Presley*, *supra*, 146 Cal.App.3d at p. 961.) Thus, "[a]n attorney fee award under a provision such as the one involved here must wait until the lawsuit is completely and finally decided [citation]." (*Ibid.*)

Here, as in *Presley*, the Bushes' success in having dismissed Miller's first attempt to appeal the trial court's underlying dismissal of his effort to compel a property sale "[did] not decide who wins the lawsuit . . . ." (*Presley, supra*, 146 Cal.App.3d at p. 961.) The dismissed appeal was defective because the trial court failed to sign its order dismissing Miller's attempt to force the sale; the court's action thus failed to comport with Code of Civil Procedure section 581d, which requires that "[a]ll dismissals ordered by the court *shall be in the form of a written order signed by the court . . . .*" (Italics added.)

Obtaining the dismissal of an appeal on this ground was a mere procedural victory rather than final disposition of the substantive issues for the Bushes. (Cf. *Presley, supra*, 146 Cal.App.3d at p. 962). Whether they would ultimately be the prevailing parties "on the contract" within the meaning of Civil Code section 1717 remained to be determined in this court in the context of Miller's then-pending second appeal.<sup>3</sup>

The Bushes contend the fee award was proper because they are entitled to costs on appeal pursuant to Code of Civil Procedure section 1032, and the fee provision in the contract simply adds attorney fees as an element of costs, in accordance with Civil Code section 1717. (See Code Civ. Proc., § 1033.5.) But the provisions allowing costs on appeal (Code Civ. Proc., § 1034 and Cal. Rules

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<sup>3</sup> In the unpublished opinion filed in the second appeal, this court rejected Miller's contention that the trial court erred in its interpretation of the parties' 2004 settlement agreement. Thus, the judgment was affirmed. (*Miller v. Bush, supra*, C060166.)

of Court, rule 8.278) "are entirely separate from the contractual provision for fees and do not depend on the party winning the appeal being the ultimate prevailing party." (*Presley, supra*, 146 Cal.App.3d at p. 962.)

The trial court's award of attorney fees must be reversed because it is "inconsistent with the well settled rule excluding attorney fees from the costs a party winning an appeal may recover under section 1034[.]" (*Presley, supra*, 146 Cal.App.3d at p. 962; Cal. Rules of Court, rule 8.278.)

Having determined that the trial court erred in awarding the Bushes attorney fees as "prevailing parties" in the first appeal (dismissed by this court on a procedural ground while the second appeal was pending), we do not consider the other errors urged by Miller on appeal.

#### DISPOSITION

The order awarding attorney fees to the Bushes based on this court's procedural dismissal of the first appeal is reversed. The parties shall bear their own costs on appeal. (Cal. Rules of Court, rule 8.278(a)(5).)

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SCOTLAND, P. J.

We concur:

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HULL, J.

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CANTIL-SAKAUYE, J.